NO. 21091

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE TURNER,

Plaintiff and Appellant,

vs.

CHARLES H. LINDQUIST,

Defendant and Respondent.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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STATEMENT OF THE PLEADINGS AND FACTS

The Complaint

This action originally was brought by Plaintiff Joe Turner against Glen R. Roland. Subsequently Plaintiff filed an Amended Complaint joining Charles H. Lundquist as a party Defendant. In essence, Plaintiff's first cause of action alleges the following: (1) Both Defendants solicited Plaintiff to purchase debentures which were to be issued by United States Chemical Milling Corporation (hereafter USCM); (2) In connection with said solicitation Defendant Roland made a number of representations to Plaintiff with the knowledge, consent and assistance of Defendant Lundquist, including representations that USCM was in sound financial

condition and that certain financial statements of USCM which were shown to Plaintiff represented truly and fairly the condition of the business and affairs of USCM; (3) In reliance upon said representations Plaintiff purchased debentures from USCM for the sum of $100,000.00; (4) Said representations were false and Lundquist, who was President and a Director of USCM, and Roland, who was a Director and Secretary-Treasurer of USCM, knew or should have known the falsity of the representations; (5) USCM is insolvent and unable to pay the debenture; and (6) The United States Mails and Instrumentalities of Interstate Commerce were used by both Defendants and by USCM in the solicitation and consummation of the transaction.

The above facts were alleged to constitute a violation of Section 10(b) of the Securities Act of 1934, 15 U.S.C.A. §78(b), and Rule X-10B-5 of the Rules and Regulations of the Securities and Exchange Commission, 17 C.F.R. 240.10B-5. Jurisdiction was alleged to be based on Section 27 of the Securities Exchange Act of 1934, 15 U.S.C.A. §78AA.

A second cause of action incorporates by reference the allegations of the first cause of action; and alleges that the facts constituted a violation of 17(a) of the Securities Act of 1933, 15 U.S.C.A. §77q. Jurisdiction is based upon Section 22(a) of the Securities Act of 1933, 15 U.S.C.A. §77v.

A third cause of action incorporates the allegations of the first cause of action and states a common law claim for fraud and deceit, seeking compensatory damages of $100,000.00 and

$75,000.00 punitive damages (C. T. 2-8).

Federal Jurisdiction

With respect to the jurisdiction of the United States District Court over the first cause of action, Section 10b of the Securities Exchange Act of 1934 provides in pertinent part:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility or any national securities exchange. . . .
>
> * * *
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Pursuant to this statutory authority, the Securities and Exchange Commission, in 1942, promulgated what is popularly known as "regulation X-10b-5", which provides as follows:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

"(a) to employ any device, scheme, or artifice to defraud,

"(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 2CCH Federal Securities Rep. Par. 22,725 (emphasis added).

Specifically, jurisdiction of the United States District Court over the first cause of action is based on Section 27 of the Securities Act of 1934, 15 U.S.C.A. Section 78aa which provides in pertinent part as follows:

"The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions of law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."

Jurisdiction of the United States District Court over the second cause of action is based on Section 17(a) of the Securities

Act of 1933, 15 U. S. C. A. Section 77q, which states in pertinent part:

> "(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly --
>
> (1) to employ any device, scheme or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Specifically, jurisdiction over the second cause of action is based upon Section 22(a) of the Securities Act of 1933, 15 U. S. C. A. Section 77v, which provides in pertinent part as follows:

> "The District Courts of the United States . . . shall have jurisdiction of offenses and violations under this sub-chapter and under the rules and regulations promulgated by the Commission in respect thereto, and

concurrent with State and Territorial Courts, of all suits in equity and actions at law to enforce any liability or duty created by this sub-chapter."

By reason of Rule 73(a) of the Federal Rules of Civil Procedure it would appear that an appeal from the judgment to the United States Court of Appeals is appropriate and that the within notice of appeal was timely filed.

STATEMENT OF THE CASE AND OF THE QUESTIONS INVOLVED

After Plaintiff's Complaint was amended so as to include Charles Lundquist as a party Defendant said Defendant moved the Court for an order disqualifying Plaintiff's then attorneys from further proceeding in the action on the ground that his attorneys had at one time represented USCM and had given legal advice to Defendant Lundquist. Extensive affidavits were filed by both sides and oral testimony was taken.

The Honorable Gus J. Solomon, District Court Judge assigned to the action, granted the motion to disqualify.

Present counsel for Plaintiff was substituted in place of the disqualified attorneys in March of 1965.

Defendant Lundquist's motion to disqualify Plaintiff's attorney, filed on August 7, 1964 was accompanied by a motion to dismiss, for more definite statement, and a motion for summary judgment (C. T. 243 etc.).

After present counsel for Plaintiff became substituted into the case, counsel for Defendant Lundquist brought to the Court's attention the fact that although the Court had ruled on Lundquist's motion to disqualify it had not ruled on his motions for summary judgment, dismissal, and for more definite statement.

Thereafter, and on June 9, 1965, the Honorable Gus J. Solomon denied the motion to dismiss, motion for summary judgment and motion for more definite statement, and in connection with said denial rendered a two-page memorandum opinion (C. T. 268-270).

> The concluding paragraph of that opinion was as follows:
>
> "It may be that after a pre-trial order is filed, the facts admitted in such order will make the controversy ripe for decision on a motion for summary judgment. In that event, the Defendant LUNDQUIST will be given the opportunity to file such a motion."

Thereafter, Judge Solomon, due to the press of court business in his own district, relinquished the case and it was assigned to Honorable Harry Westover.

A pre-trial conference was ordered held, and in connection with that contemplated pre-trial conference Defendant Lundquist submitted a proposed pre-trial conference order (C. T. 271 etc.). The Court continued the pre-trial conference until March, 1966. Plaintiff had filed over thirty exhibits he had proposed to introduce into evidence (See C. T. 316-318).

On March 4, 1966 Defendant Lundquist renewed his motion for a summary judgment and for dismissal.

In opposition to the motion for summary judgment counsel for Plaintiff filed his own affidavit in opposition (C. T. 316 etc.). Summarized, that affidavit asserted that counsel for Plaintiff had examined many of the books and records of USCM and had attended a number of sessions of the bankruptcy proceedings of USCM and that as a result of counsel's investigation he acquired personal knowledge of a number of facts, which established that the financial statements presented to Plaintiff grossly misstated the assets of USCM as well as its income, in particulars set forth in the affidavit, and that Defendant Lundquist and his family had sold USCM stock in 1960, receiving nearly $1,000,000.00.

The affidavit concluded with a statement that none of the facts asserted in the affidavit were disclosed to Plaintiff when he made his loan to USCM and that most of the facts were discovered by Plaintiff in 1965 through counsel's investigation. (The affidavit is attached as Exhibit 1 to this brief.)

The Court granted the motion for summary judgment and for dismissal (C. T. 327).

The Court should note that this is an action for fraud. Present counsel for Plaintiff took three depositions, spent over 200 hours going through voluminous records of USCM in the custody of the trustee in bankruptcy, interviewed numerous persons, read several transcripts of proceedings conducted in connection with the USCM bankruptcy, and spent approximately one week in the court

of Referee James Moriarty, listening to testimony concerning the affairs of USCM, consulted with counsel for Defendant Lundquist in the preparation of a 38-page pre-trial statement, and prepared and filed numerous contentions of fact. These contentions embodied the conclusions counsel for Plaintiff reached on the basis of the above investigation, and are conclusions based on an analysis of original, authenticated records (See C. T. 341-346 for contentions of fact).

Counsel's investigation, as reflected in Plaintiff's contentions of fact, disclosed that during the very month that Plaintiff was induced to agree to loan USCM his money, Defendant Lundquist sold 7,760 shares of USCM stock for a total gross price in excess of $80,000.00. In addition, in June of 1960, approximately 5 months prior to Plaintiff's agreeing to loan USCM his money, Lundquist sold 9,600 shares of USCM stock for a total gross sales price of $261,600.00. Sales of Lundquist's relatives were not included in those figures. Lundquist did not reveal these facts to Plaintiff.

Plaintiff was only one of a number of persons who loaned USCM substantial sums in January of 1961. Of the total loaned, $325,000.00, was used to repay loans made to USCM by various Directors, officers and relatives of Directors and officers of USCM. These facts were not revealed to Plaintiff.

Defendant Lundquist had represented to Plaintiff that the vending division of USCM was profitable, neglecting to disclose to Plaintiff that in fact it was losing large sums of money, that

management had concluded that the existing vending machines of USCM were not marketable and that a sale of the division was being seriously considered.

The vending machine situation was so bad that the machines as well as the rights of USCM under leases and sales contracts for the machines, all of which were substantially delinquent, were transferred to another corporation in return for a note for $569,000.00. The corporation which purchased all those machines and lease and sale contracts had practically no assets at the time of the transaction and was controlled by the Directors of USCM. At the time of the transaction the Directors of USCM put their shares of the other corporation in the names of dummies so that an investigation would not reveal that a majority of the shares of the transferee corporation were owned by the officers and Directors of USCM. All of this was brought out in the bankruptcy proceedings before Referee Moriarty and were matters of public record in 1965.

The effect of the transaction was that USCM carried on its books a note of $569,000.00. If President Lundquist had not engineered the transaction, there would have been substantial write-offs by the corporation's accountants based on the unmarketability of the vending machines and the delinquencies in payments by the various vendees and lessess. Ultimately these machines were repossessed or disappeared.

In addition, the financial statement presented to Plaintiff indicated a termination claim against Boeing Airplane Company of $395,551.00, carried in the full amount thereof. Lundquist

neglected to disclose to Plaintiff that the claim was not based on any written contract, and that Boeing had denied liability. Shortly after Plaintiff made his loan to USCM the amount of that asset was substantially written down and ultimately the claim was settled for $100,000.00.

The consolidated financial statement presented to Plaintiff showed that for the previous fiscal year USCM had earned a profit of nearly $1,000,000.00. In fact it suffered a loss that year, which it concealed by means of such devices as above described.

In the proceedings before the Referee in bankruptcy the trustee claimed that substantial sums were paid by USCM to its profit sharing plan based on the profit reflected in the financial statement shown to Turner, and that in fact profits for the year were slight if any. The Referee in bankruptcy has ruled that the financial statement which served as a basis for the contribution to the employees' profit sharing fund (the same financial statement shown to Plaintiff) vastly misstated the results of operations for that fiscal year.

Why Defendant Lundquist, who was President of USCM, engineered this deception cannot be known for sure. Had the true facts concerning the financial health of the corporation been disclosed to the debenture purchasers such as Plaintiff, and to the public at large, no one would have bought the debentures and presumably the USCM stock would have fallen much faster than in fact it did fall in 1960 and Lundquist would not have been able to realize the hundreds of thousands of dollars of profit that he made when he

sold his stock in USCM.

Counsel for Plaintiff has recited above only some of the deceptions practiced by Lundquist. And although, at least for purposes of this appeal, the above statements are my own assertions, the fact remains that in the bankruptcy proceedings the Referee has announced that there was a gross falsification of USCM's financial position in its financial reports. And although Defendant Lundquist was not technically a defendant in the bankruptcy proceedings before Referee Moriarty, the fact remains that he had a sufficient interest to be in attendance almost every day of the hearings and that Robert Driscoll, counsel for Defendant Lundquist in this action, was counsel in the bankruptcy proceedings. Hence, USCM was found to have distributed grossly misleading financial statements in a proceeding in which for all practical purposes Defendant was the real party in interest.

Thus in analyzing this case this Court should at least be aware of the fact that Defendant Charles Lundquist is guilty of the grossest kind of fraudulent deception and that this was found to be the case by a Referee of the United States District Court for the Southern District of California.

Justice demands that Plaintiff be given an opportunity to prove the fraud and compel Lundquist to disgorge some of the profits he has made by his manipulations.

SPECIFICATION OF ERRORS

1. The motion to dismiss should have been denied because the first amended Complaint was not defective.

2. The motion to dismiss should have been denied even if the first amended Complaint was defective, in order to give Plaintiff an opportunity to remove any technical defect by amendment.

3. The motion to dismiss should have been denied because said motion previously had been made to Judge Solomon and had been denied by him, and this became the law of the case as to any coordinate judge.

4. The motion for summary judgment should have been denied because a previous motion based on facts of the same legal significance had been denied by Judge Solomon, and such denial was the law of the case as to any coordinate judge.

5. Before ruling on the motion for summary judgment the Court should have granted Plaintiff's counsel's request for leave to file an additional affidavit in the event that the existing affidavits on file were insufficient to raise a genuine issue of fact.

ARGUMENT

I

THE MOTION TO DISMISS SHOULD HAVE BEEN DENIED BECAUSE THE AMENDED COMPLAINT WAS NOT DEFECTIVE.

To this day Appellant's counsel is not sure exactly why the trial Court granted Defendant Lundquist's Motion to Dismiss. The trial Court, in granting the Motion to Dismiss and the Motion for Summary Judgment, did not file a Memorandum of Opinion which might have indicated the basis for its decision. There were, however, remarks made by the Court and counsel at the time of hearing on Defendant Lundquist's Motion to Dismiss and Motion for Summary Judgment, which remarks are transcribed in Volume 2 of the Clerk's Transcript. Appellant's counsel can only assume that the reasons for the Trial Court's action may be inferred from the Trial Court's statements at the time of oral argument.

The Trial Court remarked (C. T. 4-5) as follows:

"I went over these files the other day and it seems to me that the motion must be granted. I will tell you why . . . then you say in paragraph VI: 'Defendants and each of them solicited Plaintiff to purchase - -' now, that's fine, but in Paragraph VII you say: 'In so soliciting Plaintiff to purchase, Defendant Roland made the following representations.' Now, you don't say that Lundquist did anything at all. All you allege is that Lundquist was a member of the

board of directors and that he was president. Now how can you maintain an action with that sort of an allegation?"

However, page 3 of the first Amended Complaint (C. T. 4) states in part as follows:

"In so soliciting Plaintiff to purchase said debentures, Defendant Roland made the following representations, among others, to Plaintiff with the knowledge, consent and assistance of Defendant Lundquist. . . ."

Further, on page 2 of the first Amended Complaint, Plaintiff alleged that "Defendants, and each of them, solicited Plaintiff to purchase. . .".

In view of the above allegations, we submit that the agency relationship between Defendants Lundquist and Roland, both of whom were officers and directors of the corporation, was sufficiently alleged so as to make the representations of Defendant Roland binding upon Defendant Lundquist.

II

THE MOTION TO DISMISS SHOULD HAVE BEEN DENIED EVEN IF THE FIRST AMENDED COMPLAINT WAS DEFECTIVE, IN ORDER TO GIVE PLAINTIFF AN OPPORTUNITY TO REMOVE ANY TECHNICAL DEFECT BY AMENDMENT.

Plaintiff's contentions of fact filed with the trial court before the hearing on the Motions to Dismiss and for Summary Judgment contained numerous allegations of conduct by Defendant Lundquist and numerous allegations concerning the financial condition of USCM, which Defendants concealed from Plaintiff. Said contentions of fact also recited numerous representations that were set forth in Plaintiff's contentions as being representations of Defendants. The contention that Defendants concealed numerous facts from Plaintiff and that Defendants made numerous affirmative misrepresentations are set forth in detail at pages 341-346 of the Clerk's Transcript.

Hence, even if the first Amended Complaint did not sufficiently allege Defendant Lundquist's participation in the representations, the contentions of Plaintiff on file with the trial court gave notice to all concerned that Plaintiff was contending that the misrepresentations were by Defendant Lundquist as well as Roland.

Further, aside from the above, the exhibits lodged with the court before oral argument on Defendant's motions included numerous documents signed by Defendant Lundquist and admitted by Defendant Lundquist in the pretrial statement to have been

executed by him. See, for example, references in the pretrial statement (C. T. 284-285) to Plaintiff's Exhibit 1, which was a copy of an agreement between USCM and certain lenders, including Plaintiff. The pretrial statement admitted that Defendant Lundquist executed said agreement on behalf of USCM and that Plaintiff also executed the agreement. This agreement was the agreement pursuant to which Appellant purchased the debenture from USCM. The agreement contained the following representation:

> "The financial statements, including the balance sheet and income statement as at and to September 30, 1960, and all notes thereto, which were heretofore delivered to you, present fairly the consolidated financial condition of the company and its subsidiaries at September 30, 1960, and the results of operations of such corporations for the periods specified therein. . . ."

Exhibit 3 lodged with the court, referred to in the pretrial statement (C. T. 284) was a copy of a letter to Plaintiff from USCM signed by Defendant Lundquist as president of USCM and on behalf of USCM. Exhibit 5 was a copy of the USCM annual report for the fiscal year ended January 31, 1960. It was admitted in the pretrial statement that Plaintiff received said annual report in December 1960 at the same time he received a copy of Exhibit 3. Said financial statement purported to show a profit for USCM and its subsidiaries of approximately one million dollars for the preceding

year.

In a nutshell, the significance of the above Exhibits is as follows: Defendant Lundquist, on behalf of USCM, made a representation to Appellant in Exhibit 1 lodged with the trial court that the financial statements dated January 31, 1960 and September 30, 1960 fairly represented the financial situation of USCM as and for the periods covered in those respective statements. A large part of Appellant's case is that in fact they did not fairly represent the financial situation of USCM. All of this was made known to the trial court on oral argument on Defendant's motions.

In this connection, counsel for Appellant argued to the trial court as follows:

> "Furthermore, I could be in error, but I believe that the Complaint alleges an agency relationship between Roland and Lundquist, so that the representation of Roland would be a representation of Lundquist. . . . But more than that, your Honor, you have representations in the financial statements of USCM which are signed by Defendant Lundquist, representations and the agreement pursuant to which Mr. Turner purchased stocks; representations that the financial statements submitted to Mr. Turner accurately represented the financial condition of the company. . . . However, it seems to me that any defect that may have existed, and I am not conceding that it did exist in the Complaint, has been cured by the allegations of

the Plaintiff in the pretrial statement. We have gone this far and I would hate to think that on the eve of trial the Plaintiff is going to be thrown out of Court because perhaps technically he may have not alleged specifically that Defendant Lundquist made any representations. I would be prepared to amend the Complaint accordingly and set forth the representations that were made by the Defendant Lundquist. . . . If the Court is correct that there is a defect and if this defect has not been cured by the pretrial statement, then I submit that I should have an opportunity to cure that defect which, as far as I am concerned is purely technical, because we have got the facts, we have alleged them in an affidavit and alleged them in the pretrial statement and we can allege them in the Complaint if necessary." (C. T. V. 2, 6-7).

Hence it must be conceded that Appellant contended throughout the proceedings that Defendant Lundquist as well as Roland made misrepresentations and that the fact that Defendant Lundquist did make representations was proved by Plaintiff's pretrial Exhibits and conceded by Defendant Lundquist in the pretrial statement. All of this was brought to the attention of the trial court, and if there was any technical defect in Plaintiff's first Amended Complaint, he could have amended it to cure any technical defects. And as shown on page 7 of Volume 2 of the Clerk's Transcript, Plaintiff's counsel

requested the opportunity to file an amended Complaint if the Court felt that the existing Complaint was defective in its statement of a claim against Defendant Lundquist.

If the Court felt that the first Amended Complaint was defective, it was error for the Court to grant Defendant Lundquist's Motion to Dismiss without first giving Plaintiff an opportunity to cure the defect by amendment. An analysis of the above subject is contained in Barron and Holtzoff, Federal Practice in Procedure, Volume IA, Section 356 as follows:

> "The motion to dismiss for failure to state a claim on which relief can be granted is viewed with disfavor in Federal Courts because of the possible waste of time in case of reversal of a dismissal of the action, and because the primary objective of the law is to obtain a determination of the merits of the claim. . . . The United States Supreme Court has endorsed the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. . . the test is whether in the light most favorable to Plaintiff, and with every intendment regarded in his favor, the Complaint is sufficient to constitute any valid claim."

In United States v. Thurston County Nebraska, 54 F. Supp. 201 (affirmed at 149 F. 2d 485 - 8th Circuit), the court stated:

"The rule is that it (motion to dismiss), should be denied, though the complaint be infirm, if it is reasonably conceivable that at the trial upon the merits the Plaintiff might establish a cause of action (citations)." (Matter in parenthesis supplied).

And in John Walker and Sons v. Tampa Cigar Co., 197 F. 2d 72, 73 (5th Circuit), the Court stated:

"It is also elementary that a complaint is not subject to dismissal unless it appears to a certainty that the Plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations. Even then, a Court ordinarily should not dismiss the Complaint except after affording every opportunity to the Plaintiff to state a claim upon which relief might be granted."

The above case was quoted with approval in reversing a dismissal in Black v. First National Bank of Mobile, Alabama, 255 F. 2d 373 (5th Circuit).

In Nagler v. Admiral Corporation, 248 F. 2d 319 (2nd Circuit), the trial court had dismissed for improper pleading. The appellate court stated:

"The drastic remedy here granted for pleading errors is unusual, since outright dismissal for reasons not going to the merits is viewed with disfavor in the

federal courts. . . .

"Courts naturally shrink from the injustice of denying legal rights to a litigant for the mistakes in technical form of his attorney . . . . We are clear, therefore, that the case must go back for some less final disposition at least permitting plaintiffs to amend."

III

BOTH THE MOTION TO DISMISS AND THE MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BECAUSE A PREVIOUS MOTION BASED ON FACTS OF THE SAME LEGAL SIGNIFICANCE HAD BEEN DENIED BY ANOTHER COORDINATE JUDGE.

As mentioned above, Defendant Lundquist's original Motion to Dismiss and Motion for Summary Judgment were denied by Chief Judge Solomon of Oregon, while on assignment to the United States District Court of the Southern District of California. Judge Solomon had previously disqualified Plaintiff's original counsel from further proceeding in the action, after a lengthy hearing involving oral testimony, extensive affidavits and legal memoranda. Hence Judge Solomon was intimately familiar with the case when he denied Lundquist's Motions to Dismiss and for Summary Judgment, Judge Solomon previously having handled numerous matters related to the case, extending over a period of many, many months. However, Judge Westover, newly assigned to the case and not previously having decided any matter of substance concerning the case, granted

Defendant Lundquist's Motions when renewed by said Defendant.

As far as Appellant can determine, anything favorable to Lundquist's Motions which was presented to Judge Westover had previously been presented to Judge Solomon.

In Commercial Union of South America Inc. v. Anglo-South American Bank, 10 F. 2d 937, one Judge of the District Court had denied a Motion to Dismiss the Complaint on the ground of insufficiency. A second judge granted the Motion when later renewed. The Court of Appeals reversed, holding that regardless of the propriety of the first judge's denial of the Motion, the ruling was the law of the case and should not have been changed by another judge. In the words of the Court:

> " . . . the decision made by Judge Mack was the law of the case as established in the District Court, and should have been so treated by any other judge sitting in the same case in that Court. Judges of co-ordinate jurisdiction, sitting in the same Court and in the same case, should not overrule the decisions of each other."

Hence aside from the propriety of Chief Judge Solomon's denial of Lundquist's Motions for Dismissal and for Summary Judgment, it was not for another United States District Court Judge to in effect overrule the previous ruling of Chief Judge Solomon.

Appellant recognizes that if Lundquist had presented legally significant additional facts to Judge Westover, which had not previously been presented to Judge Solomon, that conceivably Judge

Westover could have ruled differently from Judge Solomon. However, the fact is that in this case no legally significant facts were presented to Judge Westover that had not previously been presented to Judge Solomon. Therefore, the principle that the ruling of one judge shall not be overruled by a judge of a co-ordinate court should apply in this case.

IV

REGARDLESS OF ANY PREVIOUS RULING BY A CO-ORDINATE JUDGE, THERE WAS A TRIABLE ISSUE OF FACT ON THE STATUTE OF LIMITATIONS, AND SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

During oral argument to the trial court, appellant's attorney stated (C. T. V. 2, 13-14):

> "There was a Motion by Defendant Lundquist for Dismissal of the Complaint for Summary Judgment, for More Definite Statement, and all of these Motions were denied by Judge Solomon in a Memorandum Opinion which I have attached as an Exhibit to my own Memorandum. So I thought that point was put to rest."

Appellant's counsel went on to state (C. T. V. 2, 21-22):

> "I submit, your Honor, that when the Plaintiff discovered or should have discovered the facts constituting the fraud is a question of fact and should not be resolved on a Motion for Summary Judgment, and I am

representing to the Court that if the Court feels that the affidavits presented by the Plaintiff thus far are deficient, that I am prepared to supply additional affidavits by myself and by my client, further indicating the dates upon which he discovered specific misrepresentations. . . . If the Court feels that the affidavits are deficient in this respect, I am prepared to submit additional affidavits by myself and Mr. Turner nailing down with even greater detail the specific times when the various misrepresentations and concealments were discovered, your Honor."

This writer believes that first, Defendant Lundquist's Motions should have been denied because already previously denied by another judge of the same court; secondly, that the Affidavit of myself (C. T. 316 etc.) and the Affidavit of Robert A. Smith, original counsel for Plaintiff (C. T. 87 etc.) clearly demonstrated that when the Statute of Limitations against Plaintiff began to run was a triable question of fact; thirdly, in view of the prior ruling and in view of the affidavits submitted by Plaintiff, if the judge newly assigned to the case felt that additional affidavits would be necessary to establish a triable issue of fact, Plaintiff's counsel should have been given an opportunity to file such additional affidavits. And, as shown by the record, Plaintiff's counsel at the time of oral argument stated that he would file additional affidavits if the Court felt that the existing ones were insufficient.

The general principles with respect to the granting of Motions for Summary Judgment are set forth in Moore's Federal Practice, Volume 6, pages 2853-54 as follows:

> "The party moving for Summary Judgment has the burden of establishing by a record that is adequate for decision of the legal question presented that there is no triable issue of a material fact; and he has the burden even as to issues upon which the opposing party would have the trial burden. And the moving party's papers are carefully scrutinized, while the opposing party's papers, if any, are treated with considerable indulgence. If the moving party fails to shoulder his burden his motion should be denied, even though the opposing party has presented no evidentiary materials in opposition, and has not presented any 56 (F) affidavit."

Hence we submit that even in the absence of any affidavits by Plaintiff or his counsel, the Motion for Summary Judgment should have been denied because the moving party presented no evidence as to when Plaintiff discovered or should have discovered the facts constituting the fraud.

Barron and Holtzoff, Volume 3, states as follows (p. 132):

> "A movant is not entitled to Summary Judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy

and show affirmatively that the adverse party cannot prevail under any circumstances (numerous citations)."

Pages 135-136:

"Summary Judgment must be denied if the evidence is such that conflicting inferences could be drawn therefrom or if reasonable men might reach different conclusions (numerous citations)."

Pages 138-140:

"One who moves for Summary Judgment has the burden of demonstrating clearly that there is no genuine issue of fact. Any doubt as to the existence of such an issue is resolved against him. The evidence presented at the hearing is liberally construed in favor of the party opposing the Motion and he is given the benefit of all favorable inferences which might reasonably be drawn from the evidence (numerous citations)."

Pages 175-176:

"Summary Judgment is a drastic remedy, and the Courts properly have been liberal in exercising their discretion under Rule 56 (F) and giving the party opposing the motion full opportunity to show any genuine issue which may exist, even where the party could have made that showing at the time the motion came on for hearing."

In Tracer Lab., Inc. v. Industrial Mucleonics Corporation,

313 F. 2d 97 (1st Cir.), there was a suit for misappropriation of trade secrets. The applicable state's Statute of Limitations was two years, excluding the time during which a person liable fraudulently conceals a Cause of Action from the knowledge of the person entitled to bring the action. The Court of Appeals held that there was a genuine issue of material fact as to when Plaintiff had the requisite knowledge (page 102 of the opinion) and "consequently we believe that the District Judge erred in holding that the suit was barred by the Statute of Limitations".

In Dictograph Products Co., Inc. v. Sonotone Corp., U.S. D.C., S.D. New York (1951), 95 F. Supp. 126, Plaintiff alleged fraud. Defendant moved for Summary Judgment on the ground of laches. Motion was denied because "It cannot be determined with assurance on the present record that the Plaintiff had or was chargeable with such knowledge of the fraud . . .".

In Gonzales v. Tuttman, U.S.D.C., S.D. New York (1945), 59 F. Supp. 858, Defendant moved for Summary Judgment on the ground of the Statute of Limitations. The fourth cause of action was based on an alleged violation of Puerto Rican Law. The Puerto Rican Statute of Limitations required the action to be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached or the liability was created. The Court held:

> "The burden of establishing that no material issue of fact is present on the Motion for Summary Judgment rests on the moving party. . . . Every

doubt should be resolved against the moving party. . . . The moving party has failed to sustain its burden and hence a material issue of fact being present, the Court must deny the Motion for Summary Judgment as to the first and the third causes of action."

As to the Puerto Rican Cause of Action, the Court stated:

"The moving papers present an issue of fact as to just when the facts creating a liability were discovered and hence even assuming the Puerto Ricans Statute applies, which the Court does not decide, there is an issue of fact which necessitates a denial of the motion as to this cause of action."

And as to any alleged technical deficiency in the affidavits, the Court should note the following cases:

In Corley v. Life and Casualty Insurance Company of Tennessee, 296 F. 2d 449 (1961), the Court of Appeals reversed a Trial Court Summary Judgment on the grounds that Rule 56(e),

". . . does not require an unequivocal ruling that the evidence suggested in this particular affidavit would be admissible at the trial as a condition precedent to holding the affidavit raises a genuine issue."

The Court concluded:

"It is therefore possible and perhaps probable, that Lockhart's alleged admission out of Court will be

admissible . . . . This is sufficient to defeat the Motion for Summary Judgment because the Courts are inclined to hold the movant to a strict demonstration that no genuine issue exists."

And in United States v. Western Electric Co., 337 F.2d 568 (9th Cir. 1964), the Court of Appeals reversed a Summary Judgment. The affidavit in opposition was technically deficient because made under penalty of perjury and not under oath. The Court said that if the appellee's had objected to use of the Declaration, "the defect could have been remedied by appellants filing an affidavit in lieu of the declaration".

This Circuit concluded:

"Moreover, while Rule 56 (e) does not state any different requirement for opposing affidavits than for the movant's affidavits, 'the paper supporting the movant are more clearly scrutinized whereas the opponent's are indulgently treated'."

CONCLUSION

Even after Plaintiff's counsel argued extensively to the Trial Court with reference to the Agency allegations of the Complaint, and with reference to the Contentions set forth in the pretrial statement and the Exhibits lodged with the Court showing that the representations relied on by Plaintiff were made by Defendant

Lundquist, the Trial Court still stated at page 26 of Volume 2 of the Clerk's Transcript as follows:

> "That you don't allege any place, as far as I know, that LUNDQUIST ever made a misrepresentation to your client."

This writer of course disagrees with the Trial Court's above statement since the amended Complaint did allege that the representations made by Roland were made with the knowledge, consent and assistance of Defendant Lundquist, and since the Complaint further alleged that Defendant solicited Plaintiff. However, even if the Trial Court were correct in its above statement, the record before the Trial Court, including the pretrial statement, Plaintiff's Contentions of Fact and the Exhibits on file, all showed that Lundquist, in writing, represented to Plaintiff what the financial condition of USCM was as set forth in the financial statements shown to Plaintiff. If this was not sufficiently set forth in the Complaint, the Trial Court should have deemed the pretrial statement to have superseded the Complaint in that respect and to have cured that defect. Otherwise, the Trial Court should have permitted Plaintiff's counsel to amend the Complaint to cure the defect, if any, as requested by counsel during oral argument.

This writer still cannot believe that after a case has been pending for several years, after discovery has been completed, after a detailed pretrial statement and Plaintiff's Contentions have been filed, and after 39 proposed Exhibits are filed by Plaintiff,

and approximately one month before the date set for trial, that the Trial Court would dismiss the action on the basis of a defect which does not exist, and which if it did exist was purely technical.

On page 20 of Volume 2 of the Clerk's Transcript, the following statement was made by the Trial Court:

> "Well, now if Mr. LUNDQUIST made these misrepresentations, then you should have discovered he made the misrepresentations as soon as Mr. ROLAND made the misrepresentations. You say they did it jointly. Why couldn't you just discover that if ROLAND made a misrepresentation, then LUNDQUIST made a misrepresentation. You said they did it jointly."

While it is difficult to speculate as to exactly what the Court had in the back of its mind on the basis of the above quoted statement, it appears to this writer that what was bothering the Court was that Defendant Lundquist was not made a party Defendant originally, and that he was brought into the action as a party defendant by means of an amended Complaint. The Trial Court's apparent distaste for Plaintiff not making Lundquist a party Defendant when the action was originally filed, it seems to this writer, might have been relevant when Plaintiff requested permission to file an amended Complaint naming Lundquist as a Defendant. Judge Solomon permitted an amended Complaint to be filed naming Lundquist as a Defendant. It would appear to this writer that Judge Westover might have refused Plaintiff permission to file an amended

Complaint naming Defendant Lundquist as a party to the action and that it is this apparent attitude of Judge Westover with the respect to the propriety of filing an amended Complaint adding Lundquist as a Defendant, which has caused Judge Westover to grant the motions made by Defendant Lundquist. We submit that how Judge Westover might have ruled on Plaintiff's Motion to File an Amended Complaint naming Lundquist as an additional Defendant had the Motion been heard by Judge Westover, is no proper basis for Judge Westover to grant Defendant Lundquist's Motions to Dismiss and for Summary Judgment.

This writer respectfully urges this Court to give careful consideration to Volume 2 of the Clerk's Transcript, which sets forth in 31 pages what transpired at the hearing on Lundquist's Motions before Judge Westover.

Lundquist was made a Defendant in May of 1964. Almost two years thereafter, and less than one month before the scheduled trial date, Plaintiff is thrown out of Court, after literally hundreds of hours of work and preparation for trial. All the Appellant requests is his opportunity to have his day in Court. All he wants is the opportunity to present the facts showing the fraud and the circumstances which caused him to learn of the fraud. Then, after Plaintiff has had his day in Court, it will be proper for the trier of fact to determine 1) whether there was fraud; and 2) whether Plaintiff discovered or should have discovered the facts constituting the fraud more than 3 years before Defendant Lundquist was made a party Defendant. We are prepared to accept an adverse finding

on both whether there was fraud and on whether the Statute of Limitations had run before Lundquist was made a party Defendant. What we object to, however, is the Court making findings on these issues before Plaintiff has had a fair opportunity to present his case.

Appellant asks this Court to give him the opportunity to have this day in Court.

Attached as an appendix to this brief and incorporated hereat is a legal analysis showing that the applicable Statute of Limitations is three years from when the fraud was discovered or should have been discovered. The analysis is virtually the same as that presented to Judge Solomon prior to that Judge's denial of Defendant Lundquist's Motions to Dismiss and for Summary Judgment.

Respectfully submitted,

RICHARD H. LEVIN

Attorney for Plaintiff and Appellant.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Richard H. Levin

RICHARD H. LEVIN

EXHIBIT I

I, RICHARD H. LEVIN, declare as follows: I am attorney of record for Plaintiff in this action. Since becoming attorney of record for Plaintiff I have personally examined many of the books and records of United States Chemical Milling Corporation in the custody of the trustee in Bankruptcy and the Referee in Bankruptcy. I have also attended a number of Sessions of the bankruptcy proceedings before Referee Moriarty, where it is claimed that the USCM annual report for the fiscal year ended January 31, 1960 falsely claimed that USCM made a substantial profit that year whereas in fact it had sustained a substantial loss.

As a result of the above investigation I have acquired personal knowledge of the following facts:

1. Defendant LUNDQUIST and other USCM directors owned and controlled the Unimerc Corporation at a time when they caused Unimerc to purchase almost worthless conditional sales contracts held by USCM in exchange for a Unimerc note for $569,662.63. At that time Unimerc had practically no assets. This permitted USCM to carry the Unimerc note on USCM's books at face value, thus avoiding a $400,000.00 writedown on the value of the conditional sales contracts for the fiscal year ended January 31, 1960.

2. In January of 1960 Darco Industries, a wholly owned subsidiary of USCM, sold certain machinery to Unimerc Corporation for $208,000.00, for which USCM received a note in that

amount from Unimerc. Darco or USCM immediately leased the property back from Unimerc, and Darco took a $91, 250. 00 gain on the sale. This was a mere paper transaction between related corporations, which permitted USCM to show a $91, 250. 00 gain for the fiscal year ended January 31, 1960.

3. In 1960 Defendant LUNDQUIST and his family sold USCM stock receiving nearly one million dollars for said stock.

4. The money Plaintiff loaned USCM was to be used to pay Defendant LUNDQUIST, his family and Mr. Driscoll's law partner CLAYTON HURLEY amounts owing them for loans to USCM.

5. The annual report for the fiscal year ended January 31, 1960 carried as an asset in the full amount thereof a termination claim of $395, 551. 00 against Boeing Airplane Co.. There was no written contract between USCM and Boeing, and Boeing had denied liability on the claim.

6. In February of 1960 USCM transfered 573 Barvend vending machines to Unimerc Corporation in return for a note for $372, 450. 00. The machines were unmarketable, and the effect of the transfer was to permit USCM to carry a brand new note for $372, 450. 00 as an asset in lieu of these unmarketable machines. The results of these dummy transactions and grossly overstated assets was to permit USCM to present to Plaintiff a materially misleading picture of its financial position to induce him to make his loan to USCM.

None of these facts were disclosed to Plaintiff when he made his loan to USCM, and most of these facts were discovered

by Plaintiff in 1965 through my investigation, as a result of attending sessions of the USCM bankruptcy proceedings still pending before Referee Moriarty.

Mr. Turner is outside the County of Los Angeles at this time.

/s/ Richard H. Levin
RICHARD H. LEVIN

Subscribed and sworn to before me
March 9, 1966.

Marian Y. Anderson
My Commission Expires Feb. 24, 1967

(SEAL)

/s/ Marian Y. Anderson

APPENDIX

THE COMPLAINT IS NOT SUBJECT TO A MOTION TO DISMISS BASED UPON THE STATUTE OF LIMITATIONS.

1. The First Cause of Action.

a. There is no federal statute of limitations applicable to actions under 10(b) of the Securities Exchange Act of 1934 (15 U. S. C. §78j).

Unlike section 12 of the Securities Act of 1933 (15 U. S. C. §77) which is governed by a one year statute of limitations as set forth in section 13 of the same act (15 U. S. C. §77m), section 10(b) of the Securities Exchange Act of 1934 (15 U. S. C. §78j) does not have its own statute of limitations. Professor Loss discusses this question as follows:

> "What statute of limitations governs when, as in the case of Rule 10b-5, none is provided in the act? Section 29(b) was amended in 1938, as part of the Maloney Act amendments to §15(c) by the insertion of a statute of limitations with reference to actions under §29(b) based on alleged violation of a rule adopted under 15(c)(1). But there is no reference to §10(b) in any other section, and there is no federal statute of limitations for civil actions generally." III LOSS, SECURITIES REGULATIONS 1771 (2d ed. 1961).

It has been argued that since the Securities Act of 1933

provides comprehensive remedies for buyers, any buyer bringing an action under the more general section 10(b) of the Exchange Act of 1934 should have to meet the same one year statute of limitations applicable to buyer actions under section 13 of the 1933 Act (15 U.S.C. 77m). Section 13 reads as follows:

> "No action shall be maintained to enforce any liability created under section 77k or 771(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 771(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 771(1) of this title more than three years after the security was bona fide offered to the public, or under section 771(2) of this title more than three years after the sale...."

The contention that this section should be applied to actions brought by buyers under section 10(b) was expressly rejected in the case of Premier Industries, Inc. v. Delaware Valley Financial Corp., 185 F. Supp. 694 (E.D. Pa., 1960):

> "Moreover section 77m (section 13 of the Securities Act) expressly refers to liability under

"section 77k and section 771(2) [sections 11 and 12(2) of the Securities Act respectively], and for this court to extend its application to other sections of either act by judicial interpretation would be an affront to the legislative process. Finally, aside from all that has been said, there are such cases as Osborne v. Mallory, 86 F. Supp. 869 (S. D. N. Y., 1949); Tobacco and Allied Stocks v. Transamerica Corp., 142 F. Supp. 323 (D. Del., 1956), and other cited cases therein, which have expressly held that the statute of limitations applicable to actions under section 77q [Section 17 of the Securities Act] or Section 78j [Section 10b of the Exchange Act] of title 15 U. S. C. A. is the applicable state statute of limitations." Id., 666.

The same result was reached by the Ninth Circuit of Appeals in Ellis v. Carter, 291 F. 2d 270 (1961). The court in that case considered four alternative methods of handling buyer actions brought under section 10(b) of the 1934 act and finally adopted the method which freed such actions of, among other things, the one year statute of limitations contained in section 13 of the 1933 act:

"... we consider it [the alternative adopted by the court] the most acceptable of the four possible alternatives. It gives controlling

weight to what seems to have been the dominant policy of Congress to provide complete and effective sanctions, public and private, with respect to the duties and obligations imposed under the two acts. It requires no variance in proceedings under the 1934 act as between buyer and seller, no reason appearing why Congress would have wanted the procedures to be different. While it assumes that Congress in 1934 undid what it carefully did in 1933, it avoids judicial rewriting of the 1934 act to include procedural provisions which appear only in the 1933 act. As between the two acts which deal with the problem, it permits the most recent enactment to govern." Id., 274.

b. Actions brought under Section 10(b) are controlled by the applicable state statute of limitations governing actions based on fraud or deceit--in this case the three year limitation provided in §338 of the California Code of Civil Procedure.

As noted in the Premier Industries case, supra, it has been held with regularity that when claims for relief of a legal nature are asserted under section 10(b), the action is governed by the applicable state statute of limitations. The Ninth Circuit on two occasions has held that the applicable statute of limitations is the limitation governing actions based on fraud:

"This court held in Fratt v. Robinson,

"203 F. 2d 627 (9th Cir., 1953) at p. 634, that under the Securities and Exchange Act of 1934, the statute of limitations of the State of Washington applied when the unlawful acts occurred in Washington. This is true in our instant case. The applicable Washington statute provides for a three-year statute of limitations for fraud and further provides that the cause of action is not deemed to have accrued until discovery by the aggrieved party of the facts constituting the fraud." Errion v. Connell, 236 F. 2d 447. (9th Cir., 1956).

Section 338(4) of the California Code of Civil Procedure provides a three year limitation for

"... an action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party of the facts constituting the fraud or mistake."

c. By both federal policy and the express language of the applicable California statute of limitations, the limitations period does not commence to run until such time as the aggrieved party discovers the facts constituting the fraud.

In the case of Tobacco and Allied Stocks, Inc. v. Transamerica Corp., 143 F. Supp. 323 (D. C. Del., 1956) the court held:

"The leading case in the federal courts

"applying the equitable rule to suits at law is Bailey v. Glover, 88 U.S. (21 Wall) 342, decided in 1874. The Supreme Court held where there has been no fault or want of diligence or care, the bar of limitations included within a federally created right does not commence to run until fraud has been discovered....

"Restated, the federal doctrine means that limitation and laches does not begin to run until evidence of fraud is discovered or could have been discovered had reasonable diligence been exercised...." Id., 328, 329.

The rationale for this rule was stated by Mr. Justice Frankfurter in Holmberg v. Armbrecht, 327 U.S. 392 (1946):

"It would be too incongruous to confine a federal right within the bare terms of a state statute of limitations unrelieved by the settled federal equitable doctrine as to fraud, when even a federal statute in the same terms would be given the mitigating construction required by that doctrine.... The mitigating federal doctrine applied in Bailey v. Glover, supra, and in the series of cases following it governs." Id., 397.

d. The complaint is not subject to a motion to dismiss

based upon the statute of limitation.

As a general rule the statute of limitations is an affirmative defense and must be raised in the answer. However, where the complaint shows on its face that the action is barred by the statute of fraud, it may be raised by a motion to dismiss. Fischback & Moore, Inc. v. International Union of Operating Engineers, 198 F. Supp. 911 (S. D. Cal., 1961). It should be noted however, that in order to be subject to a motion to dismiss based on limitations the bar must appear clearly on the face of the complaint and there must not be any disputed question of fact. 1A BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, §281, p. 190, (Rules edition, 1960) and cases cited therein.

In the instant case the plaintiff has based his action on fraud and has alleged in paragraph XI of the first cause of action, that at the time of purchase of the securities in question, plaintiff was unaware of the fraud that had been perpetrated upon him. Implicit in this allegation is the fact that plaintiff did not discover the fraud until later; and of course the applicable statute of limitations, section 338(4) of the California Code of Civil Procedure, did not start until such time as plaintiff did discover the defendant's fraud. Accordingly, the motion to dismiss does not lie, because the bar of the statute does not appear on the face of the complaint.

2. The Second Cause of Action.

The second cause of action of plaintiff's complaint is based on section 17(a) of the Securities Act of 1933 (15 U. S. C. §77q).

It was held in Osborne v. Mallory, 86 F. Supp. 869 (D. C.

N. Y. , 1949), that the considerations governing the selection of a statute of limitations applicable to actions based on section 17(a) of the Securities Act were the same as those applicable to section 10(b) of the Exchange Act. The court there ruled as follows:

> "The applicable statute of limitations to actions under section 17 of the 1933 Act and §10(b) of the 1934 Act would be that of the forum, since the two federal acts do not provide any period within which suits must be brought under those sections. . . . [T]he applicable statute of limitations of the State of New York is found in the New York Civil Practice Act, §48(2) and (5), a six year statute."

The considerations governing selection of the appropriate California statute in the instant case, the tolling of the statute because of undiscovered fraud, and the applicability of the statute as a bar to the present action are discussed at length above and will not be repeated here.

3. The Third Cause of Action.

The plaintiff's third cause of action is based on common law fraud and deceit; and the applicable statute of limitations, section 338(4) of the California Code of Civil Procedure, does not begin to run until the fraud is discovered.